

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel, W.A. DREW
EDMONDSON, in his capacity as ATTORNEY
GENERAL OF THE STATE OF OKLAHOMA,
et al.,

Plaintiff,

v.

TYSON FOODS, INC., et al.,

Defendants.

Case No. 4:05-CV-329-JOE-SAJ

**DEFENDANT COBB-VANTRESS, INC.’S RESPONSE IN OPPOSITION TO
STATE OF OKLAHOMA’S MOTION FOR LEAVE TO FILE A
SUPPLEMENTAL BRIEF IN OPPOSITION TO “DEFENDANT COBB-VANTRESS,
INC.’S MOTION TO DISMISS COUNTS 4, 6, 7, 8, 9, AND 10 OF THE FIRST
AMENDED COMPLAINT OR ALTERNATIVELY TO STAY THE ACTION”**

COMES NOW Defendant Cobb-Vantress, Inc. (“Cobb-Vantress”), joined by Tyson Poultry, Inc., Tyson Chicken, Inc., and Tyson Foods, Inc. (collectively, the “Tyson Defendants”), by and through its attorneys, and submits the following response in opposition to the State of Oklahoma’s *Motion for Leave to File a Supplemental Brief in Opposition to “Defendant Cobb-Vantress, Inc.’s Motion to Dismiss Counts 4, 6, 7, 8, 9, and 10 of the First Amended Complaint or, Alternatively, to Stay the Action”* (“*Motion for Leave*”) (Docket No. 163). The Tyson Defendants respectfully request that this Court deny Plaintiff’s *Motion for Leave* because it is without merit and because supplemental briefing will not assist this Court in understanding or resolving the issues presented by Cobb-Vantress’ *Motion to Dismiss*. However, should this Court grant Plaintiff leave to file its proposed “Supplemental Brief,” the Tyson Defendants respectfully request that this Court likewise grant them leave to file a final brief addressing new matters, inconsistencies, and/or erroneous statements contained in Plaintiff’s proposed “Supplemental Brief.”

ARGUMENTS AND AUTHORITIES

A. **This Court Should Deny Plaintiff’s *Motion for Leave* Because Plaintiff’s Proposed “Supplemental Brief” Will Not Assist This Court in Understanding or Resolving the Issues Before It.**

The Federal Rules of Civil Procedure (the “Federal Rules”) do not contemplate an open-ended briefing schedule whereby a party is afforded multiple opportunities to refine and reformulate arguments made in support of its position. In motion practice, district courts generally consider a matter to be fully briefed after the filing of a motion, response, and reply. *See, e.g.,* LCvR7.1(h). The Northern District adheres to these standard limitations by discouraging supplemental briefs and allowing parties to file supplemental materials only upon motion and leave of Court. *See id.* According to Plaintiff, the “fundamental issue” presented by a party’s motion for leave to file an additional brief is “whether the supplemental brief assists the Court in understanding and resolving the issues before it.” *See State of Oklahoma’s Reply Brief in Support of its Motion for Leave to File a Supplemental Brief in Opposition to Peterson Farms, Inc.’s Motion to Dismiss and Alternative Motion to Stay the Proceedings* (Docket No. 171) at 3. Under this standard, Plaintiff’s *Motion for Leave* should be denied.

Upon the filing of *Cobb-Vantress, Inc.’s Reply in Support of Motion to Dismiss Counts Four, Six, Seven, Eight, Nine, and Ten of the First Amended Complaint or, Alternatively, to Stay the Action* (“*Cobb-Vantress’ Reply*”) (Docket No. 142), the issues presented by Cobb-Vantress’ *Motion to Dismiss* were fully briefed by the Parties, and the matter became ripe for ruling by this Court. *See* LCvR7.1(h). Nonetheless, Plaintiff now requests permission to file a “Supplemental Brief” under the guise of seeking to “clarify and correct the record” as to certain of Cobb-Vantress’ “legal contentions” and “factual characterizations of the State’s positions.” Plaintiff’s *Motion for Leave* at 1 (Docket No. 163). This Court should deny Plaintiff’s *Motion for Leave*

because it does not “clarify” or “correct” anything in the record and is, in fact, nothing more than Plaintiff’s attempt to have “the final word” by rehashing or restating the arguments contained in Plaintiff’s *Response* to Cobb-Vantress’ *Motion to Dismiss*.

Cobb-Vantress’ *Reply* brief complied with this Court’s Local Rules by addressing only new matters contained in Plaintiff’s *Response* to Cobb-Vantress’ *Motion to Dismiss*. See LCvR7.1(h). Therefore, Plaintiff’s only argument in support of its *Motion for Leave* is its general disagreement with certain “legal contentions” and “factual characterizations” made by Cobb-Vantress in support of Cobb-Vantress’ propositions that: (1) Plaintiff’s common law claims of nuisance, trespass, and unjust enrichment are precluded by Oklahoma’s litter application laws and regulations; (2) Plaintiff has failed to exhaust its administrative remedies for Counts 7, 8, and 9; and (3) the doctrine of primary jurisdiction mandates the stay or dismissal of Counts 4, 6, 7, 8, 9, and 10 of Plaintiff’s First Amended Complaint in deference to the administrative processes available before the Oklahoma Department of Agriculture, Food, and Forestry and the Arkansas Soil and Water Conservation Commission. See Cobb-Vantress’ *Motion to Dismiss* and *Reply* (Docket Nos. 67 and 142, respectively).

Under the pretext of attempting to assist this Court with its deliberations, Plaintiff’s proposed “Supplemental Brief” contains Plaintiff’s “legal contentions” regarding: (1) the merits of Cobb-Vantress’ arguments for dismissal and stay; and (2) the proper interpretation of

authorities cited in Cobb-Vantress' briefs.¹ Plaintiff's proposed "Supplemental Brief" simply restates the arguments contained in Plaintiff's *Response* and adds nothing of substance to the briefs now before the Court. Therefore, this Court should deny Plaintiff's *Motion for Leave* because Plaintiff's proposed "Supplemental Brief" will not assist this Court in understanding or resolving the issues now before it, and because it is for this Court – not Plaintiff – to decide the merits of Cobb-Vantress' arguments for dismissal and to interpret the authorities cited in Cobb-Vantress' briefs.

B. A Movant Should be Allowed to Make the Final Argument in Motion Briefing Because the Movant Bears the Burden of Persuasion in Such Matters.

Though not specifically articulated in the Federal Rules, a fundamental working tenet of the federal judicial system is that the party bearing the burden of persuasion on a particular matter is afforded an opportunity to present a final argument before the Court or a jury begins its deliberations. For example, with respect to motion practice, the Local Rules of the Northern District contemplate that a matter will be ready for decision after the movant makes its final arguments by filing its reply brief. *See* LCvR7.1(h). Cobb-Vantress submits that the issues raised by its *Motion to Dismiss* have been fully briefed and developed by the Parties and that the

¹ The Tyson Defendants note that many of the legal and factual contentions included in Plaintiff's proposed "Supplemental Brief" are incorrect and/or rest upon Plaintiff's fundamental misreading of authorities. *See, e.g.*, proposed "Supplemental Brief" at 6 (misconstruing language in Oklahoma's Agricultural Code (OKLA. STAT. tit. 2, § 2-16); Environmental Quality Code (OKLA. STAT. tit. 27A, § 2-3-504); and Concentrated Animal Feeding Operations Act (OKLA. STAT. tit. 2, § 20-26) discussing actions brought by the Attorney General "on behalf of the State of Oklahoma" as somehow obviating the requirement of exhausting mandated administrative remedies before ODAFF); and proposed "Supplemental Brief" at 7 (arguing that deferral under primary jurisdiction is improper because "Arkansas does not yet even have an animal waste management program in place.") Plaintiff's assertions on both of these points, and several others in its proposed "Supplemental Brief," are plainly incorrect. In the event the Court grants Plaintiff's request for leave to file a "Supplemental Brief," fairness requires that Cobb-Vantress be granted similar leave to file a final, responsive supplemental brief with respect to these and other erroneous assertions made by Plaintiff in its proposed "Supplemental Brief."

matter is ripe for decision without Plaintiff's proposed "Supplemental Brief."² *See id.* However, if this Court were to grant Plaintiff leave to file its proposed "Supplemental Brief," Cobb-Vantress respectfully requests that this Court provide it with an opportunity to make a final argument in support of its *Motion to Dismiss* by likewise granting Cobb-Vantress leave to file a final, responsive supplemental brief.

C. The Reality of "Meet and Confer" Discussions Between Counsel Relating to Plaintiff's Request For Supplemental Briefing.

Plaintiff states that it contacted counsel for Cobb-Vantress and that Cobb-Vantress objected to the Plaintiff's *Motion for Leave*. In reality, Mr. David Riggs, counsel for Plaintiff, contacted Stephen L. Jantzen to inquire as to whether the Tyson Defendants would oppose any effort by Plaintiff to file a surreply or other supplemental briefing relating to Cobb-Vantress' *Motion to Dismiss Counts Four, Six, Seven, Eight, Nine, and Ten of the First Amended Complaint or, Alternatively, to Stay the Action and Integrated Opening Brief in Support* (Docket No. 67). In response, Mr. Riggs was informed Plaintiff could represent to the Court that Cobb-Vantress does not object to such an attempt so long as Cobb-Vantress was granted an opportunity to file a subsequent, responsive brief.

CONCLUSION

For the reasons stated herein, the Tyson Defendants respectfully request this Court to enter an order:

² As set forth in a separate filing, while Cobb-Vantress welcomes the opportunity to present oral argument on its *Motion to Dismiss*: (1) there should be no oral argument on any matters pending before the Court prior to resolution of the Defendants' *Motion to Stay Proceedings* (Docket No. 125) in light of the case now pending before the United States Supreme Court styled *State of Arkansas v. State of Oklahoma*; and (2) in the interest of judicial economy, there may be no need for oral argument as the issues have been fully developed by the Parties' respective briefs. *See Defendants' Response to the State of Oklahoma's Request for Oral Argument on Defendants' Motions to Dismiss* (Docket No. 175).

- (1) denying the Plaintiff's *Motion for Leave*; or
- (2) alternatively, granting Cobb-Vantress leave to file a final, responsive brief to Plaintiff's "Supplemental Brief" in the event Plaintiff's *Motion for Leave* is granted; and
- (3) granting the Tyson Defendants such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ Stephen L. Jantzen

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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